by Arthur L. Corbin, Justus S. Hotchkiss, Professor of Law, School of Law, Yale University. Professor Leslie J. Ayer of the Law School of the University of Washington gave a course in Commercial Law and Professor Matthew C. Lynch of this school gave Equity II. Several courses in Criminology were offered under Jau Don Ball, M. D., Professor of Mental and Nervous Diseases, Oakland School of Medicine and Surgery; Edward O. Heinrich, City Manager and ex-officio Director of Public Safety, Boulder, Colorado; August Vollmer, Chief of Police of Berkeley and Francis L. Ingersoll and A. R. Mehrtens of Berkeley.

M. C. L.

A Review of Recent Cases in the California Courts for the Quarter Ending August, 1919

I. Constitutional and Administrative Law, Including Procedure.

A CURIOUS fact was adverted to in a review of the California case law published in this Review last September, namely, the paucity of decisions involving questions arising out of the war. This singular phenomenon is even more observable in the cases decided during the last quarter. A student looking for historical material concerning the war would find nothing to illustrate it in the many decisions handed down by the Supreme Court of California and the five other courts of appeal in this state.

The most important decision in the field of constitutional law is *Frost v. City of Los Angeles*,[1] holding unconstitutional the provisions of the Statute of 1913, p. 793, requiring suppliers of water for human consumption to procure permission from the state board of health to continue their service, and further authorizing the board to grant permission only where it finds that the water being supplied is "the purest and most healthful obtainable." The statute also provided that any private citizen might enjoin the continuance of such service where no permission was thus obtained. The plaintiff under the authority of the statute sought to restrain the City of Los Angeles from sup-

[1] (Aug. 11, 1919) 58 Cal. Dec. 119.

plying its citizens with water under the authority of the statute referred to. As the learned justice who delivered the opinion of the court said, "Apparently this part of the law is based on the theory that it is better for the urban population of the State that they should die of thirst than that they should quench it with ordinary healthful water." The Frost case will probably be cited hereafter not only upon the question of the extent of the police power, but also upon the point whether and how far it is permissible for a court of equity in cases of public nuisance to balance convenience in issuing or refusing injunctive relief. The Supreme Court, by a decision participated in by all the members of the court, declares the supremacy of the judicial power in administering equitable relief—the legislature apparently cannot confer upon a private citizen the power to bring a bill to abate a public nuisance so as to make the bill in effect one brought by a public official. The rights of the citizen are to be measured by the ordinary rules of equity, not by those applicable to the sovereign suing by its representative, the attorney general.

There are other cases involving questions of constitutional law, but the only one we have noted as of special interest is that of *Beck v. Ransome-Crummey Company,*[2] and that is interesting not so much for the point decided as for the *dictum,* based on Murray v. Hoboken,[3] that "due process of law is the exact equivalent of the law of the land as used in the Magna Charta." This is like Dr. Johnson's definition of a net as "something meticulated or decussated at equal intervals with interstices between the intersections," a case of *ignotum per ignotius.* Mr. McKechnie's able work on Magna Charta tells as well as can be told at the present day what "lex terrae" meant in 1215; it certainly did not mean anything so modern as our "due process of law."

The increasing activity of governmental agencies continues to occupy much of the courts' attention. A tendency is observable toward giving more elasticity to the management of municipal corporations. Thus, in *Cary v. Long,*[4] it is held that municipal corporations may enter into arbitration proceedings with the same freedom as individuals; *Skidmore v. West*[5] recog-

[2] (Aug. 14, 1919) 29 Cal. App. Dec. 562.
[3] (1855) 18 How. 272, 15 L. Ed. 372.
[4] (Aug. 15, 1919) 29 Cal. App. Dec. 579.
[5] (July 30, 1919) 29 Cal. App. Dec. 441.

nizes the power of a county board of supervisors to make a contract to employ private individuals on a percentage basis to collect data for the purpose of collecting taxes. The authorization comes from section 3897 of the Political Code, which abrogates the effect of the decision to the contrary in House v. Los Angeles County.[6]

The power of a municipal corporation to annex territory is placed beyond successful attack by ordinary action at law or bill in equity by the decision in *Coe v. City of Los Angeles,*[7] which holds that a citizen and tax payer cannot attack the legality of proceedings for annexation, but that the State must do so through *quo warranto* proceedings. Ordinarily, of course, the State will not take measures to interfere in such matters.

In *Boyd v. City of Sierra Madre,*[8] involving the validity of a municipal ordinance, Finlayson, P. J., is obliged to invoke Milton's Paradise Lost to find a suitable description for the horrors of the ass's bray. Even a small town may protect its citizens from assaults on their ears by these offensive sounds by passing an ordinance regulating the keeping of burros and mules. Nor is the ordinance invalid for discrimination where a power of granting permission to keep the animals is left to the discretion of officials. It cannot be assumed that the latter will necessarily abuse their discretion. Such decisions as this are paving a broad way for the introduction of better ideals and practices in local government.

The non-liability of the sovereign which has in certain aspects been criticized in this Review and elsewhere[9] finds illustration in *Dillwood v. Riecks.*[10] Though municipal corporations have in large measure become subject to the duties which apply to individuals, as was strikingly illustrated in *Chafor v. City of Long Beach,*[11] counties are political divisions of the State and subject to the rule of non-liability. The case of Dillwood v. Riecks, while it absolves the county from liability for loss of a stallion destroyed by the negligence of those in charge of an

[6] (1894) 104 Cal. 73, 37 Pac. 796.
[7] (July 29, 1919) 29 Cal. App. Dec. 453.
[8] (June 10, 1919) 28 Cal. App. Dec. 1366.
[9] Austin T. Wright, Government Ownership and the Maritime Lien, 7 California Law Review, 242; Harold J. Laski, The Responsibility of the State in England, 32 Harvard Law Review, 447; John M. Zane, A Legal Heresy, 13 Illinois Law Review, 255 (Celebration Legal Essays in Honor of John H. Wigmore.)
[10] (July 11, 1919) 29 Cal. App. Dec. 519.
[11] (1917) 174 Cal. 478, 163 Pac. 670, Ann. Cas. 1918D 106.

agricultural park who set fire to dry grass near its stall, places responsibility upon the officers of the county. It extends somewhat the doctrine of Doeg v. Cook,[12] and makes the officials liable for negligent performance of duty, whether the performance of such duty involves discretion or not. The correctness of the decision is not questioned, but the justice and policy of such a state of the law may well be criticized. Now that the theory of sovereignty exemplified in Prussian political philosophy has been so thoroughly discredited, is it not desirable that the whole question of liability of the State and its political subdivisions for wrongs done to individuals should be re-examined? It is indeed strange that England and America, the homes of political liberty,, should harbor the doctrine of non-liability of the sovereign—a theory long discarded in the legislation of continental Europe.[13]

The *de facto* doctrine, an invention of judges to do substantial justice where the rights of individuals are affected by officials, finds exemplification in *Page v. Mintzner.*[14] This case holds that a public officer may, so far as the public is concerned, perform valid acts, though he has neither filed his official bond nor taken his oath. Holmes' Common Law is cited by Mr. Justice Brittain to the effect that "the law is administered by able and experienced men who know too much to sacrifice common sense to a syllogism."

An important point in administrative law is decided in *Yolo Water and Power Company v. The Superior Court.*[15] The superior court has no jurisdiction, so this case decides, to hear and determine an action brought by a district attorney in the name of the State to restrain a diversion of public waters, constituting in fact a public nuisance, where the railroad commission has given permission to make such diversion. Private individuals might have refuge in the fourteenth amendment against an outrageous interference with their property to an extent such as that described in the Yolo Water and Power Company case, but could the State invoke the federal constitution upon the theory of *dominium ultimum* in the waters of the State?[16] An almost absolute power in the most irresponsible form is vested in the

[12] (1899) 126 Cal. 213, 58 Pac. 707, 77 Am. St. Rep. 171.
[13] John M. Maguire, State Liability for Tort, 30 Harvard Law Review, 20, 22.
[14] (Aug. 15, 1919) 29 Cal. App. Dec. 576.
[15] (Aug. 8, 1919) 29 Cal. App. Dec. 507.
[16] Georgia v. Tennessee Copper Co. (1907) 206 U. S. 230, 51 L. Ed.

railroad commission, if this decision be sound, as, indeed, it seems to be. Apparently it will be necessary to retrace some of the steps taken in the direction of turning over affairs of government to commissions.

The usual number of employers' liability cases is found among the decisions of the last quarter, though none seem to be particularly novel or of wide interest. The same may be said as to the criminal cases. Ought not some check be placed upon the reporting of opinions presenting no aspects of general interest?

Reversals for errors in procedure are rare, both in criminal and in civil cases. *McLaughlin v. Los Angeles Railway Corporation*[17] is, we believe, the only case during the quarter reversed for errors in the trial court in the handling of the admission of evidence. The case was tried without a jury, but the decision of the trial court was set aside by a District Court of Appeal because of an erroneous procedure in the method of impeaching witnesses and in cross-examination. The phenomenon of reversing a case for such errors is so rare nowadays as to elicit comment. The legal craving for technical accuracy, however, may still be satisfied to some extent in appellate practice. Thus, an unfortunate clerk who put a notice of appeal under the door of the clerk's office, which had been closed for the day, was responsible for the decision in *W. J. White Company v. Winton*,[18] dismissing an appeal for failure to file the notice in time.

Upon the subject of parties defendant, *Patterson Glass Company v. Thomas et al.*[19] presents the peculiarity of permitting an unincorporated labor association to be made defendant. It has always been supposed that section 388 of the Code of Civil Procedure marked the limit of a plaintiff's right to sue unincorporated associates. Though a similar decision in England a few years since produced a revolution in labor legislation, the point of the union's liability was not even discussed in the court's opinion in the present case. *Schaad v. Barceloux*[20] permits a plaintiff to change his complaint from one stating an action in the conversion to one praying the specific recovery of shares of stock or

1038, 27 Sup. Ct. Rep. 618.

[17] (June 9, 1919) 57 Cal. Dec. 563.

[18] (June 23, 1919) 29 Cal. App. Dec. 9.

[19] (June 12, 1919) 29 Cal. App. Dec. 1385.

[20] (July 23, 1919) 29 Cal. App. Dec. 354.

their value. The court very properly holds that the cause of action is not thereby altered. Hiner v. Hiner[21] is reaffirmed in *Mattson v. Mattson*[22] to the effect that it is unnecessary in an action for maintenance to aver the plaintiff's residence. A rather anomalous situation in suits against receivers is illustrated by *People ex rel. California Safe Deposit and Trust Company v. Magee*[23] which holds that the statute of limitations begins to run from the date of the accrual of the cause of action as in ordinary cases, notwithstanding the fact that the plaintiff must get leave to sue the receiver. "The obtaining of such permission is no part of the plaintiff's cause of action, but simply a step in his remedy."

Foreign corporations may not claim a residence in the State, nor demand a change of place of trial, under the provisions of the Constitution, to the county where an injury occurred, as may domestic corporations; it is so held in *Ryan v. Inyo Cerro Gordo M. & P. Company.*[24] A decision of much more general interest is that in *Atchison, Topeka and Santa Fe Railway Company v. Smith,*[25] adopting a liberal view in regard to bills of peace. The case should be carefully compared with Noroian v. Bennett,[26] commented on in a recent number of this Review.[27] In the case now decided by a District Court of Appeal, it is held that a railway company may enjoin the prosecution of more than six hundred actions pending in justices' courts brought against the railway company for recovery of excessive freight charges, and may obtain the relief of having them consolidated and tried in the Superior Court. There was no proof of fraudulent or oppressive conduct on the part of the defendants.

II. Commercial Law.

One might imagine that the long tilled fields of commercial and private law would cease to produce grist for the legal mill. But in fact the harvest remains as rich as ever. Well-established legal principles seem to be perpetually disregarded. People, for example, continue to go on agreeing to do things "to the satisfaction" of some one else, and then claiming when the time for performance arrives that they did not mean what they said,

[21] (1908) 153 Cal. 254, 94 Pac. 1044.
[22] (Aug. 16, 1919) 58 Cal. Dec. 133.
[23] (June 25, 1919) 29 Cal. App. Dec. 37.
[24] (June 26, 1919) 29 Cal. App. Dec. 41.
[25] (August 5, 1919) 29 Cal. App. Dec. 482.
[26] (1919) 57 Cal. Dec. 238, 179 Pac. 158.
[27] 7 California Law Review, 269 (May, 1919).

as did the plaintiff in *Tiffany v. Pacific Sewer Pipe Company.*[28] Sometimes they escape the strict meaning of their words, especially in building contracts, but usually the courts refuse to make a contract for the parties different from that which they have chosen to express. This is what happened in the case referred to.

Much confusion exists in the minds of business men and lawyers as to the nature and effect of an account stated. *Bennett v. Potter*[29] dispels much of the fog surrounding the subject, though it merely holds that a written contract cannot be altered by a mere oral account stated. The opinion of Shaw, J., contains a valuable discussion as to the nature and effect of the account stated. Also involving the change of a written contract by parol, *Dodge v. Chapman*[30] decides that an oral agreement by a landlord to accept a decreased rent from his tenant, even where acted upon does not discharge a guarantor on the lease, for the reason that the modification does not constitute an enforceable obligation. Though both Bennett v. Potter and Dodge v. Chapman involve the interpretation of section 1698 of the Civil Code, as has just been said, the latter case does not refer to the section. The difference between an alteration of a contract such as discharges sureties and an unenforceable agreement to alter the contract is illustrated by *Nissen v. Ehrenpfort.*[31] There a guarantor of the payment of a promissory note was discharged by the payee's writing in the margin, with the maker's consent, a provision for payment of interest.

Several decisions in the law of sales of personal property are of interest. *Hamilton v. Klinke*[32] again decides that a crop not yet planted may be the subject of a chattel mortgage, taking priority over a sale of the crop when grown. If the Uniform Sales Act hereafter be adopted, the law on the subject of sales of goods in potential existence will be put in a better condition for the needs of commerce, but there will be required additional legislation to cover the situation of the chattel mortgage. Should the doctrine of potential existence ever have been applied where the lien theory of mortgage extends to chattels, as in California? It is interesting to observe that the earlier cases justifying the

[28] (July 5, 1919) 58 Cal. Dec. 35.
[29] (July 30, 1919) 58 Cal. Dec. 83.
[30] (Aug. 11, 1919) 29 Cal. App. Dec. 525.
[31] (Aug. 8, 1919) 29 Cal. App. Dec. 496.
[32] (July 28, 1919) 29 Cal. App. Dec. 409.

doctrine that an ungrown crop may be mortgaged were decided before the Civil Code had extended the lien theory to the chattel mortgage. Another case involving the law of sales is *Pacific Western Commercial Company v. Western Wholesale Drug Company*,[33] holding that the right to rescind for breach of warranty is not lost by a resale, where the resale is made before an opportunity has been afforded to inspect the goods. *Silverston v. Kohler & Chase*[34] recognizes the right of the conditional vendor to retake the goods for default in payment of instalments on the contract, notwithstanding the vendor has sued for an instalment, provided, of course, that the retaking can be had peaceably. If, however, the vendor sues for the entire purchase price, he loses his right of recaption. Fraud in an agreement, consisting in one of several joint adventurers contracting for a secret profit, justifies a rescission, though the person seeking rescission has suffered no financial loss. *Menefee v. McDonald*[35] so decides.

Los Angeles Investment Company v. Home Savings Bank of Los Angeles[36] is an important case in the law of banking and commercial paper. The ultimate point on which the decision turned was that a banker could not justify the payment of checks on forged indorsements, but there are many important principles of banking law discussed in the opinion of the Supreme Court written by Mr. Justice Olney, and the case will doubtless be much cited hereafter. *Spotten v. Dyer*[37] is another case involving this branch of law. The decision is that the note was not negotiable, though in form complying with the law as to negotiability, because it was known by the purchaser to have been given as payment on a contract of which it was a part, upon a consideration which had failed. The case might as well have been rested upon the proposition that the purchaser was not a *bona fide* purchaser, but the court preferred to place its decision upon the peculiar rules of the California court—prior to the adoption of the Negotiable Instruments Law. The question of negotiability is, the court suggests, often dependent upon the fact whether or not the maker is estopped to deny negotiability.

Insurers and insured are affected by *Rossini v. St. Paul Fire*

[33] (June 23, 1919) 29 Cal. App. Dec. 25.
[34] (Aug. 18, 1919) 58 Cal. Dec. 138.
[35] (July 5, 1919) 29 Cal. App. Dec. 153.
[36] (June 19, 1919) 57 Cal. Dec. 612.
[37] (Aug. 8, 1919) 29 Cal. App. Dec. 503.

and Marine Insurance Company.[38] A clause in a policy of insurance against keeping gasoline "on the premises" is not violated where gasoline is kept six feet away from the building insured. Nor does the fact that the insurer's risk is increased thereby, discharge the insurer, under the provisions of section 2755 of the Civil Code.

The "trust fund" theory was held inapplicable to the case of a "one-man corporation," where the president, who was practically sole owner, used the corporation's funds to pay his debts. Creditors of the corporation, who became such after this irregular diversion of its assets, could not complain, it was held in *Scales v. Holje,*[39] though creditors might have done so, if the company had owed them money at the time of the misappropriation. Another corporation case that deserves mention is *Slayden v. O'Dea,*[40] reaffirming the long line of cases holding a judgment against a dissolved corporation to be absolutely void. As was pointed out some years ago in this Review, none of these cases refer to section 404 of the Civil Code, which seems to lay down a definite rule opposite to that announced by the courts.[41] It looks as though the section referred to was intended to declare such judgments valid. Of course, if there has been an omission on the part of counsel to call the courts' attention to a plain statutory provision, the line of decisions referred to would have to be disregarded in favor of the plain language of the statute. The fact that section 404 of the Civil Code is tucked away in an obscure corner of that instrument may account for the fact that it has not yet been commented upon in any of the cases involving the point.

III. Property, Torts and Persons.

In spite of the increasing importance of administrative law, whose whole effect is to encroach on the field of private ownership, the courts of California are still flooded with a mass of litigation arising out of the ownership of property. Strange to say, some of these cases deal with situations which must frequently have occurred. Thus, *Oakland Bank of Savings v. California Pressed Brick Company*[42] decides for the first time a question that must often have arisen in practice—namely, as to

[38] (July 31, 1919) 29 Cal. App. Dec. 445.
[39] (June 25, 1919) 29 Cal. App. Dec. 34.
[40] (July 16, 1919) 29 Cal. App. Dec. 267.
[41] 4 California Law Review, 409.
[42] (July 3, 1919) 29 Cal. App. Dec. 132.

the priority of right as between a conditional vendor of a machine which has been attached to land so as to become a fixture, and the *bona fide* mortgagee of the land. The court, following a marked tendency in earlier cases, resolves the question in favor of the conditional vendor of the chattel. The rule is not entirely satisfactory, laid down in the broad fashion in which the court announces it, though it may be appropriate under the facts of the case under decision. How about the situation where the conditional vendor has received practically full payment, and the bona fide mortgagee has not security sufficient to pay his mortgage if the machinery be detached? It would seem the latter ought to have a right of redemption of some sort; that the whole question should be determined upon the application of the broadest principles of equity. In another case, which involved a second mortgagee's rights in land, *Levy v. Levy Real Estate Company,*[43] these principles were liberally applied. Notwithstanding certain rather formidable *dicta* to the contrary, it was decided that a second mortgagee might have a receiver for rents and profits, though his mortgage did not cover them expressly, while the prior mortgage did. The decision rested upon the ground that the second mortgagee would probably be unable to protect himself against loss otherwise, because of the inadequacy of his security. Under the lien theory of mortgage, there would seem to be no reason to protect the prior mortgagee beyond the needs of giving him perfect security, while the mortgagor ought, of course, to pay his debt if he can out of the income of the land.

Muzio v. Erickson[44] is to the effect that an easement strictly defined must be attached to a fee simple estate. Therefore, there can be no true easement for the use of a stairway. Whatever relief the claimant of a right to use the stairway is entitled to, must be worked out through the doctrine that there is a covenant express or implied, to maintain it. The destruction by fire in this case relieved the quasi-servient owner from the obligation to rebuild. *Porter v. City of Los Angeles*[45] seems to hold that the cause of action for removal of lateral support of land accrues in California at the date of the excavation, not at the date of the damage, and further that the action for the wrong is trespass and not case. Both propositions come to one as something

[43] (June 30, 1919) 29 Cal. App. Dec. 94.
[44] (June 7, 1919) 28 Cal. App. Dec. 1310.
[45] (July 5, 1919) 29 Cal. App. Dec. 148.

of a surprise. It is, indeed, a startling piece of legal information to be told that though no damage has yet occurred by reason of a neighbor's making lawful excavations on his land, the cause of action may be barred. Again it is difficult to understand how a common law action of trespass would have lain against a man for acts done wholly on his own soil. Possibly the present writer has misunderstood the court's decision and he therefore refrains from more severe criticism.

Coon v. Sonoma Magnesite Company[46] illustrates the difference between an "exception" and a "reservation" (though the court in its opinion does not use the words with technical strictness). A conveyance was made of land reserving to the grantor a defined strip of land "for a road." It was held that there was an exception of the strip, that the grantor retained the fee, and that he therefore might use it for any purpose he chose. Had it been construed as the "reservation" of an easement, it could, of course, be used for no other purpose than that of a road. *Brown v. Rives*[47] was also a case involving the execution of deeds, though it might more properly be classed as one involving liability for negligence. A notary public to whom a bank cashier introduced a person whose name appeared as grantor in a deed took an acknowledgement of the deed. Subsequently it turned out that the grantor was a fictitious person and that the person acknowledging the deed was a forger. In an action against the sureties of the notary by the vendee, it was held that there was no liability. There seems to be no reason to doubt that the notary acted reasonably, and should not be made liable in damages, nor his sureties held because of his honest mistake. The court's decision seems right on this ground. But the learned justice who writes the opinion says that the notary did exactly right; he took the acknowledgment of the grantor in the deed, though that grantor was a liar and a forger. This reasoning is most specious, and substitutes form for reality. It would result in the practical absurdity of relieving every notary who takes the acknowledgment of a stranger without any introduction such as was had in the case under comment. The acknowledgment becomes a useless ceremony.

Since section 3787 of the Political Code was amended in 1913, deeds to the State made upon sales for unpaid taxes have been

[46] (May 31, 1919) 28 Cal. App. Dec. 1250.
[47] (July 29, 1919) 29 Cal. App. Dec. 423.

more useful muniments of title than previously. That section makes the deed conclusive evidence of the regularity of all proceedings from the date of the assessment to the date of the deed. But deeds made under the Street Improvement Bond Act of 1913[48] are only *prima facie* evidence of the regularity of such proceedings. It was accordingly held in *Chapman v. Jocelyn*[49] that a sale which did not include interest to the date of sale was void. There was also a failure to comply strictly with the form of notice required by the statute. In *Coleman v. County of Los Angeles*,[50] the Supreme Court decided another point of interest in connection with tax sales. Section 3898 subdivision 5 of the Political Code was interpreted literally according to "the equity of the statute," as they used to say in Coke's day. The subdivision referred to provides that when it is determined in an "action at law" that a sale and conveyance to a purchaser from the State is void, the full amount paid out by the purchaser for the property shall be repaid him. The Supreme Court very properly holds that the words "action at law" embrace a "suit in equity." One who will read the whole statute will be convinced of the correctness of the court's holding.

A new point, in this State at least, was decided in one of the most archaic of all branches of the law, the law of landlord and tenant. *Downing v. Cutting Packing Company*[51] holds that after a notice to quit is given, the landlord has no power to withdraw the notice until he gets the tenant's consent. In this case he accepted rent from the guarantor, which he was obliged to pay back, for the reason that the lease was at an end. *Harrelson v. Miller & Lux, Incorporated*,[52] determines that letting a third person feed his sheep on stubble on the leased land is not a violation by the tenant of the covenants against assignment and subletting.

Persons engaged in examining abstracts of title will be interested in *City Properties Company v. Fitzmaurice*[53] to the effect that a judgment lien arising from filing a transcript of judgment in another county is released not by the filing of a satisfaction piece, but by actual satisfaction. *Woodill & Hulse Electric Com-*

[48] Cal. Stats. 1913, pp. 849, 852, § 5 sub. K.
[49] (May 31, 1919) 57 Cal. Dec. 525.
[50] (July 9, 1919) 58 Cal. Dec. 60.
[51] (June 6, 1919) 28 Cal. App. Dec. 1275.
[52] (June 25, 1919) 29 Cal. App. Dec. 50.
[53] (June 28, 1919) 29 Cal. App. Dec. 90.

pany v. Young[54] puts at rest a doubt that never should have existed in regard to the priority of liens attaching *in rem* by public authority, in particular, street assessment liens. It would seem self-evident that the latest of such liens should prevail, as the Supreme Court now positively decides. But Braly v. Burke[55] and other cases by what are now said to have been *dicta,* had caused uncertainty as to what the Supreme Court would hold.

In *Estate of Carraghan,*[56] it was urged that the homestead act of 1868 had not been repealed, and that under that act a homestead might be declared on land held in joint tenancy or in co-tenancy. The court held that the Civil Code repealed the statute of 1868, and apparently on the rule of *stare decisis* and not on principle, followed the decisions denying the power to declare a homestead on property so held. Possibly the decree adjudging a homestead made supplemental to a divorce decree silent as to property rights, was void on procedural grounds, as is held in *Lang v. Lang.*[57] But it is not clear at all, as the court holds, that the husband and wife became mere tenants in common in the homestead property upon the divorce. The homestead survives the death of one of the spouses, and it is not apparent why divorce should have an effect different from death, in dissolving it.

Cases between sellers and purchasers of land are common, most of them not involving points of peculiar interest. *La Chance v. Brown*[58] says that the loss by fire falls upon the vendor. This is a far cry from the generally prevailing rule. The doctrine of equitable conversion seems to be rarely invoked in California; the tendency seems to be toward applying legal doctrines rather than equitable ones to the treatment of contracts for the sale of land. *Lemle v. Barry*[59] states rather too broadly the principle that an imperfect title, where there has been no fraudulent misrepresentation, does not invalidate the contract of sale. And *Ratzlaff v. Trainor-Desmond Company*[60] inserts a rather peculiar limitation upon the doctrine of Joyce v. Shafer[61] by deciding that where the vendor not only sells the land which he

[54] (July 5, 1919) 58 Cal. Dec. 42.
[55] (1891) 90 Cal. 1, 27 Pac. 52.
[56] (Aug. 8, 1919) 58 Cal. Dec. 115.
[57] (June 25, 1919) 29 Cal. App. Dec. 31.
[58] (June 9, 1919) 28 Cal. App. Dec. 1350.
[59] (Aug. 7, 1919) 58 Cal. Dec. 107.
[60] (June 13, 1919) 28 Cal. App. Dec. 1398.
[61] (1893) 97 Cal. 335, 32 Pac. 320.

has contracted to convey but also assigns the contract of purchase, he indicates an intention to abandon the contract. Lemle v. Barry[62] also clearly reaffirms the principle that the vendee cannot be put in default until a deed is tendered, even though time be of the essence of the contract. It seems necessary that this elementary principle in the law of contracts should be periodically re-stated.

Other cases concerning title to property, dealing with the equitable aspect of ownership rather than the legal are *Fidelity Savings & Loan Association v. Rodgers*,[63] *Smitten v. McCullough*[64] and *Williamson v. Williamson*.[65] The first illustrates the familiar principle that an incompleted attempt to make a gift cannot be supported as an equitable assignment; the second that one who accepts an equitable lien on personal property as security for a prior indebtedness is not a bona fide purchaser, but will take subject to an equitable lien prior in date; the third case holds that where a husband conveys land to his wife, the latter has the burden of proving absence of undue influence and the existence of a consideration.

A few decisions in the law of intestate succession are important. *Estate of Marshall*[66] settles that a step-child is an heir, though not of the blood of the person from whom he inherits, under subdivision 8, section 1386, of the Civil Code. Such a decision would have been impossible under common law theories, but the statute referred to has plainly abandoned blood-relationship as the test. In *Estate of Walker*[67] twins born within five months after an interlocutory decree of divorce were conclusively presumed legitimate, while in the *Estate of McNamara*[68] a child born 304 days after the mother's leaving her husband was not embraced under the conclusive presumption of legitimacy.

Norton v. Norton[69] is interesting for the reason that the instrument which in one aspect constituted a will, was also a contract. Estate of Hoytema[70] on the other hand, presented,

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[62] Supra, n. 59.
[63] (July 5, 1919) 58 Cal. Dec. 39.
[64] (June 24, 1919) 29 Cal. App. Dec. 29.
[65] (June 24, 1919) 29 Cal. App. Dec. 22.
[66] (Aug. 14, 1919) 29 Cal. App. Dec. 553.
[67] (June 5, 1919) 57 Cal. Dec. 540.
[68] San Francisco Recorder, Aug. 29, 1919.
[69] (June 6, 1919) 28 Cal. App. Dec. 1428.
[70] (May 29, 1919) 57 Cal. Dec. 491.

so the majority of the justices of the Supreme Court decided, the case of a testamentary instrument, formally perfect, without testamentary effect. The opinion of the three dissenting justices will, to many, seem the more convincing. *Estate of Moore*[71] holds that a will of later date may be admitted to probate more than one year after a will of earlier date has been admitted. The Chief Justice dissented on the ground that the decision was inconsistent with the theory that a decree admitting a will to probate is an *in rem* decree and establishes conclusively that the instrument admitted is the last will. The result of the decision, however, is a gratifying one, for it escapes establishing a formal rule of procedure which would prevent the real facts from being proved, without any compensating advantage in the way of securing stability for title.

A testator gave "to each of my sisters and brother living five hundred dollars." This includes only those living at the time of the testator's death, not at the time of the will's execution, it is decided in *Estate of Rounds*.[72] Possibly a somewhat artificial rule, but generally a useful and just one. A clause in a will for the purpose of discouraging contests provided that benefits given to anyone under the will were forfeited "where any attempt was made to defeat its provisions." The Supreme Court in *Estate of Bergland*[73] held that one in good faith presenting an alleged will for probate (which, however, was rejected) did not fall within the provision, a decision which is good sense, but difficult to express in terms of general principle. A condition in restraint of marriage, forfeiting benefits in case of the legatee's marriage to a particular woman, was involved in *Estate of Duffill*.[74] However, the marriage occurred before the testator's death, so that the condition subsequent could not be performed. The provision therefore never took effect. The case is important as being the first one to decide the question as to whom stock dividends should go in case of a life interest with a remainder over. The court holds that where paid out of earnings in the life tenant's lifetime they should go to the latter. If declared out of the *corpus*, they should go to the remainderman. The "United States rule" is followed rather than the "Massachusetts rule."

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[71] (June 19, 1919) 57 Cal. Dec. 591.
[72] (May 20, 1919) 57 Cal. Dec. 473.
[73] (June 20, 1919) 58 Cal. Dec. 6.
[74] (July 30, 1919) 58 Cal. Dec. 97.

The crop of negligence legislation is large and the facts involved are frequently interesting. But as in questions of criminal law, the points of law involved are usually procedural. A few, however, deal with novel situations. *Roos v. Loeser*[75] decides that the owner of a pet dog may maintain an action against the owner of another dog, which attacked and killed his dog without provocation. The law of animals was also involved in *Opelt v. Al. G. Barnes Company.*[76] A ten-year-old boy climbed into the space between a leopard's cage and the circus tent. The owner was held not liable for the injuries inflicted by the leopard, because of the boy's negligence and assumption of risk. An owner of an automobile who lent the car to a third person whom he accompanied was held liable for the bailee's negligence in *Randolph v. Hunt.*[77] But an automobile owner is not liable where his chauffeur uses the car upon an errand of his own, according to *Gousse v. Lowe.*[78] The rather unusual situation of ratifying the tort of assault was presented in *Johnson v. Monson.*[79] The defendants who kept a saloon were held liable for an assault made by the bar-keeper upon a customer, upon the ground that they learned and approved of what he had done.

Orrin K. McMurray.

[75] (June 27, 1919) 29 Cal. App. Dec. 59.
[76] (June 27, 1919) 29 Cal. App. Dec. 61.
[77] (June 25, 1919) 29 Cal. App. Dec. 65.
[78] (June 24, 1919) 29 Cal. App. Dec. 19.
[79] (Aug. 15, 1919) 29 Cal. App. Dec. 570.